

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF TEXAS  
HOUSTON DIVISION**

JOSEPH ANTON *ET AL.*,

*Plaintiffs,*

vs.

THE GOODYEAR TIRE &  
RUBBER CO., *ET AL.*,

*Defendants.*

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CIVIL ACTION H-06-3221

**ORDER**

This matter is before the court on the motions of defendants Monaco Coach Corporation (Dkt. 36) and Goodyear Tire & Rubber Company (Dkt. 39) for leave to designate responsible third parties pursuant to Texas Civil Practice & Remedies Code § 33.004.

Plaintiffs object that Section 33.004 of the Texas Civil Practices & Remedies Code, setting forth the rule for designating a responsible third party in tort cases, is a procedural rule that does not apply in federal court.<sup>1</sup> Federal courts in Texas that have recently considered the issue reject plaintiffs' argument. *Cortez v. Frank's Casing Crew & Rental Tools*, Civil Action No. V-05-125, 2007 WL 419371, \*2 (S.D. Tex. Feb. 2, 2007); *Muniz v.*

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<sup>1</sup> Plaintiffs, who initially named the proposed responsible third parties as defendants in this case but dismissed them due to probable lack of personal jurisdiction, do not argue that the defendants have failed to allege sufficient facts concerning the alleged responsibility of the third parties as required by § 33.004(g)(1).

*T.K. Stanley, Inc.*, Civil Action No. L-06-CV-126, 2007 WL 1100466, \*2-3 (S.D. Tex. April 11, 2007); *Bueno v. Cott Beverages, Inc.*, No. Civ. A. SA.04CA24XR, 2005 WL 647026, \*3 (W.D. Tex. Feb. 8, 2005).

The court concludes that § 33.004 is substantive in nature and not a mere procedural joinder rule.<sup>2</sup> It is an integral part of Texas's proportionate responsibility scheme as developed by the Texas legislature during its sweeping tort reform of 1995 and 2003. *See Mims v. Dallas Cty.*, No. 3-04-CV-2754-M, 2006 WL 398177, \*6 (N.D. Tex. Feb. 17, 2006). Under current Texas law, a jury in a tort case is asked first to determine whether the plaintiff, defendant, settling party, designated responsible third party, or contributing party was negligent in causing plaintiffs' injuries. If the jury answers yes to the basic negligence question, the jury is asked to determine the percentage of responsibility attributable to (1) each claimant, (2) each defendant, (3) each settling person, and (4) each responsible party who has been designated under § 33.004.<sup>3</sup> TEX. CIV. PRAC. & REM. CODE § 33.003; *In re United Elevator Serv. Co.*, 178 S.W.3d 53, 61 (Tex. App. – Houston [1st Dist.] 2005, no pet.). The jury may not apportion responsibility as to contributors or any third party not

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<sup>2</sup> The only part of § 33.004 that relates to joinder, § 33.004(e), extends the statute of limitations as to plaintiffs' claims against a designated responsible third party. It is well established that state statutes of limitations are substantive laws that apply in federal diversity actions. *Vincent v. A.C. & S., Inc.*, 833 F.2d 553, 555 (5th Cir. 1987) (citing *Guaranty Trust Co. v. York*, 326 U.S. 99, 110-11 (1945)).

<sup>3</sup> *See* TEX. PATTERN JURY CHARGE 4.1, 4.3 (2006) (responsible third parties are included in the basic liability question if designated under Texas Civil Practice & Remedies Code § 33.004, and if so, are also be submitted in the proportionate responsibility question).

designated under § 33.004. *Id.* ; *see also In re Thornton*, No. 14-03-00712-CV, 2004 WL 114978, \*2 (Tex. App. – Houston [14th Dist.] Jan. 26, 2004) (under pre-2003 statute, only a responsible party joined under § 33.004 may be included in the proportionate responsibility jury question). A defendant is liable to a plaintiff only for the percentage of damages equal to the percentage of responsibility allocated to the defendant. TEX. CIV. PRAC. & REM. CODE § 33.013(a). Thus, the designation of a responsible third party directly and substantively affects the amount of defendants' liability, and plaintiffs' recovery.

Under § 33.004, in effect as of 2003, a designated responsible third party is not joined as a party in the lawsuit. Therefore, § 33.004 does not conflict in any way with the joinder provisions of Federal Rule of Civil Procedure 14. *See, e.g., Cortez v. Frank's Casing Crew & Rental Tools*, Civil Action No. V-05-125, 2007 WL 419371, \*2 (S.D. Tex. Feb. 2, 2007).

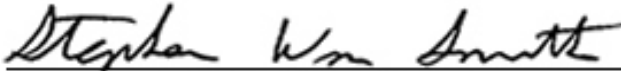
For the reasons stated above, defendants' motions (Dkts. 36, 39) are granted.<sup>4</sup> Pruett Tire, Inc./Nevada, Les Schwab Tire Centers of Nevada, Inc., Pruett Tire, Inc. d/b/a Les Schwab Tires, and Intermountain Tire Center, Inc. d/b/a Pruett Tire, Inc. are designated as

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<sup>4</sup> If, after discovery, there is no evidence that the designated third party is liable for any portion of plaintiffs' alleged injuries or damages, a party may move to strike the designation. TEX. CIV. PRAC. & REM. CODE § 33.004(l).

responsible third parties pursuant to § 33.004 and subject to the provisions of Texas Civil Practices and Remedies Code Chapter 33.<sup>5</sup>

Signed at Houston, Texas on June 8, 2007.

  
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Stephen Wm Smith  
United States Magistrate Judge

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<sup>5</sup> This designation alone does not impose liability. TEX. CIV. PRAC. & REM. CODE § 33.004(i).